Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

DARYLL RICHARDSON, and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES R. RAY
ROBERT S. CATZ
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

Counsel for Petitioners

August 26, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. QUESTION PRESENTED

Are private parties performing traditional public functions as prison correctional officers under color of law on behalf of the government, police powers exclusively reserved to the sovereign as delegated to their employer, a private for profit corporation operating a correctional facility under contract as authorized by state law, entitled to assert the defense of qualified immunity as defendants in a damage action brought under 42 U.S.C. § 1983 by a prison inmate while fulfilling their statutorily defined duties of providing correctional services to convicted inmates placed in their custody and confinement by the Tennessee Department of Corrections?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Daryll Richardson and John Walker[1] respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 10, 1996.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported. *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). (App. 1-22). The decision of the United States District Court for the Middle District of Tennessee is not reported. (App. 23-37). Both decisions are reproduced in the Appendix hereto.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 10, 1996. This petition for writ of certiorari was filed in this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to Supreme Court Rule 29.1 petitioners disclose that they are correctional officers employed by the Correctional Corporation of America (CCA) of Nashville, Tennessee. CCA is underwriting petitioners' defense of this action. Thus, a favorable decision by the Court would end CCA's expenditure of petitioners' defense.

IV. STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

"The Private Prison Contracting Act of 1986", as amended, T.C.A. § 41-24-101 et seq. is reproduced in the Appendix attached hereto at App. 50-64.

V. STATEMENT OF THE CASE

In 1986 the Tennessee legislature enacted the "Private Prison Contracting Act of 1986", T.C.A. § 41-24-101 et seq. The Act authorizes the Tennessee Commissioner of Corrections to enter into contracts for the management and operation of correctional facilities and for the provision of correctional services with private sector prison contractors to prison inmates under the custody of the Tennessee Department of Corrections. T.C.A. § 41-24-103. The preamble of the Act makes clear the experimental nature of the Act and authorizes the Tennessee Commissioner of Corrections:

> [T]o contract with private concerns on a limited basis to afford the opportunity to determine if savings and efficiencies can be effected for the operation of correctional facilities and at the same time insure that the interests of the state citizens and employees can be fully protected.

1986 Tenn. Pub.Acts ch.932. *See generally,* W.J. Cody & A. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience,* 40 VAND.L.REV. 829 (1987).

Under the Tennessee Act "correctional services" are defined broadly to include the following public functions, services and activities within the prison:

> (A) Education, training and job programs;
>
> (B) Recreation, religious and other activities;
>
> (C) Development and implementation assistance for classification, management information systems or services;
>
> (D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;
>
> (E) Counseling, special treatment programs, or other programs for special needs; and
>
> (F) Operation of facilities, including management, custody of inmates, and providing security;

T.C.A. § 41-24-102.

Respondent Ronnie Lee McKnight is a state inmate in the custody of the Tennessee Department of Corrections. The Commissioner of Corrections designated that respondent be confined at the South Central Correctional Center

(SCCC), Clifton, Tennessee, a facility managed and operated under a contract entered into by the Tennessee Commissioner of Corrections and the Corrections Corporation of America (CCA). CCA is a private, for profit corporation, and its employees are private individuals who act under the authority of the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101 et seq. By contract the State of Tennessee has delegated to them as employees of CCA , police powers and traditional public functions exclusively reserved to the sovereign to provide comprehensive correctional services to prisoners sentenced by the Tennessee courts in the custody and confinement of the Tennessee Commissioner of Corrections. The Act prohibits the delegation of specific powers and duties to private contractors in the areas of inmate parole, release, work release and furloughs, calculating good time credits, levels of restrictive custody and disciplinary actions. These powers are expressly reserved to the Tennessee Commissioner of Corrections. T.C.A. § 41-24-112.

On March 3, 1994 respondent McKnight filed the instant action for $400,000 in compensatory and punitive damages under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee against John Rees[2], the warden of the South Central Correctional Center (SCCC) and two of its correctional officers Daryll Richardson and John Walker. *McKnight v. Rees*, No. 1-94-0042 (M.D.Tenn.) (App. 38-49) The respondent's complaint alleges that his rights to be free from cruel and

[2] Warden John Rees was subsequently dismissed from the case. Respondent McKnight did not appeal the dismissal. (App. 2) Accordingly, Warden Rees is not before the Court.

unusual punishment under the Eighth Amendment of the United States Constitution were violated when he was subjected to excessively tight restraints which caused him severe bodily injury during his transport on September 13, 1993 from the Tennessee Reception Center, Nashville, Tennessee to SCCC, Clifton, Tennessee. Respondent alleges that the restraints caused him extreme pain and swelling which resulted in his hospitalization, and that when he complained to petitioners Richardson and Walker about the restraints his pleas were deliberately ignored, and that he was taunted by them after he complained about the restraints, and that said conduct of respondents amounted to deliberate indifference of his medical needs in violation of *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 114 S.Ct. 1970 (1994).

On December 2, 1994 petitioners McKnight and Walker moved to dismiss the complaint asserting that as private persons acting under color of law and performing exclusive public functions as correctional officers delegated to their employer, the Corrections Corporation of America, they were entitled to the defense of qualified immunity. On March 1, 1995 the district court denied the motion to dismiss, holding that petitioners Richardson and Walker, private persons employed as agents of a private, for profit corporation were not entitled to the defense of qualified immunity. In denying the petitioners' motion to dismiss, the district court relied on its earlier decision in *Manis v. Correctional Corporation of America*, 859 F. Supp. 302 (M.D.Tenn.1994). On March 6, 1995, petitioners filed a timely interlocutory appeal to the United States Court of Appeals for the Sixth Circuit as provided under *Mitchell v. Forsyth*, 472 U.S. 511 (1995); *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995) (App. 2). The

jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. On July 10, 1996 the Sixth Circuit affirmed the district court's denial of the petitioners' motion to dismiss the respondent's complaint, holding that the defense of qualified immunity was unavailable to private persons acting under color of law.

This timely petition for writ of certiorari follows.

V. REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Decision Below Conflicts with Applicable Decisions of the First, Seventh, Tenth and Eleventh Circuits Which Hold that Private Parties Acting Under Color of Law on Behalf of the State, Fulfilling Statutorily Authorized Functions and Duties Under Contract or Court Mandate are Entitled to the Defense of Qualified Immunity from Suit Brought Under 42 U.S.C. § 1983.

This petition raises a fundamental and important core question of federal law regarding the availability of the qualified immunity defense to private parties acting under color of law while engaged in the performance of an exclusive governmental police power function of the custodial detention of state prisoners in their capacity as private prison correctional officers at the behest of the state, an issue left unresolved by recent prior decisions of the Court. Review by the Court is necessary to resolve a clear and irreconcilable conflict with the Sixth Circuit's decision below and applicable decisions of the First,

Seventh, Tenth and Eleventh circuits on a core and fundamental question of federal law of nationwide import.[3]

In *Lugar v. Edmonston Oil Co.*, 457 U.S. 922, 942 (1982) the Court held that a private party initiating state attachment procedures later successfully challenged as unconstitutional, acts under color of state law and is liable for the deprivation of property under 42 U.S.C. § 1983. In *Lugar*, the Court declined to "reach the question of the availability of [qualified immunity] to private individuals at this juncture." *Id.* at 942 n.23.

In *Wyatt v. Cole*, 504 U.S. 158 (1992) the Court reviewed the qualified immunity issue left open in *Lugar* "whether private defendants charged with 42 U.S.C. § 1983 violations are entitled to qualified immunity from suit." *Id.* at 159. In *Wyatt* the Court noted:

> The question on which we granted certiorari is *a very narrow one*: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available to them the good faith immunity applicable to public officials." The precise issue encompassed in this question, and the *only* issue decided by the lower courts, is whether qualified immunity, . . . is available for private defendants

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[3] The Corrections Corporation of America (CCA), headquartered in Nashville, Tennessee, operates 33,000 beds under government contract in fifty facilities in the United States, Great Britain and Australia. *THE TENNESSEAN*, at p.1E (July 28, 1996). In the United States, CCA provides correctional services in the First Circuit (Puerto Rico), Fifth Circuit (Louisiana, Mississippi, Texas), Sixth Circuit (Tennessee), Tenth Circuit (Kansas, New Mexico) and the Eleventh Circuit (Florida).

> invoking a state replevin, garnishment or attachment statute.

Id. at 168. (Emphasis added)

In *Wyatt* the Court answered the question no when it held that qualified immunity is not available to defendants acting purely as private parties for personal gain invoking unconstitutional statutory seizure remedies. *Id.* 168-169. In reaching its conclusion the Court noted "that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. In so holding the Court noted:

> Unlike school board members, or police officers, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly extending qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions they will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attentuated to justify such an extension of our doctrine of immunity.

Id. at 168. (Citations omitted)

Since this Court's decision in *Wyatt*, the First, Seventh, Tenth and Eleventh Circuits have construed this Court's holding narrowly, limiting its application to the "precise issue" that qualified immunity is not available as

a defense in cases only where private parties act under color of law in pursuit of its own narrow private interests unrelated to the performance of a governmental function. In contrast the Sixth Circuit has rejected this approach and reads *Wyatt* as creating a broad per se rule that *"private parties are not eligible for immunity from suit."* (App. 21).

Those circuits in conflict with the Sixth Circuit draw factual and policy distinctions in two category of cases when resolving whether a private defendant acting under color of law should be afforded the availability of a qualified immunity defense under 42 U.S.C. § 1983. Thus, private parties acting under color of law and fulfilling a traditional governmental function at the behest of the sovereign either under contract, agreement, grant or pursuant to a court mandated order are entitled to assert a qualified immunity defense otherwise recognized as available to public officers acting in a similar capacity. *Rodrigues v. Furtado*, 950 F.2d 805, 815 (1st Cir. 1991) (private physician who performed vaginal cavity search pursuant to valid search warrant entitled to qualified immunity); *Frazier v. Bailey*, 957 F.2d 920, 928-929 (1st Cir. 1992) (private social workers who contracted with state to provide statutorily required counseling and investigative services of child abuse are entitled to qualified immunity); *Sherman v. Four County Counseling Center*, 987 F.2d 387, 405-406 (7th Cir. 1993) (qualified immunity applies to private medical institution involved in emergency court ordered involuntary detention and treatment of plaintiff); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.), *cert. denied*, 114 S.Ct. 609 (1993) (private physician under contract to provide medical services to county jail entitled to

qualified immunity); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (physician whose private employer held state contract to provide medical care to state prison system entitled to qualified immunity); *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir. 1995) (private crisis center director conducting strip search at police officer's request entitled to qualified immunity); *Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996) (private person charged with power pursuant to city council resolution to grant or deny applications for Christmas displays in city park entitled to qualified immunity).

On the other hand, private parties acting under color of law for purely private financial gain or solely for narrow self-interest as in *Wyatt*, unrelated to the performance of a traditional public function are not entitled to qualified immunity. *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 787 (11th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) (private defendants acting in concert with public officials of military college to terminate plaintiff's employment because of husband's public criticism of institution not entitled to qualified immunity); *Howerton v. Gabica*, 708 F.2d 380, 385 n.2 (9th Cir. 1983) (private landlord who enlisted services of police officers to assist in unlawful eviction not entitled to qualified immunity); *Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir.), *cert. denied*, 506 U.S. 817 (1992) (private party who conspired with prosecuting attorney to indict a co-worker for perjury not entitled to qualified immunity); *Vector Research, Inc. v. Howard & Howard, Attorneys, P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996) (private attorneys assisting law

enforcement in unlawful search and seizure not entitled to qualified immunity).

In rejecting the availability of the defense of qualified immunity to petitioners Richardson and Walker, private correctional officers employed by CCA under state contract authorized by the Tennessee Commissioner of Corporations, the Sixth Circuit offered the following policy rationale which conflicts with the several circuits that have construed *Wyatt* narrowly by limiting this Court's holding only to those factual circumstances where a private person acts under color of law to promote an exclusive private interest:

> The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. . . . Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.
>
> * * *
>
> Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby insuring their own job security. While this arguably did not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been

> injured by official conduct and protecting government's ability to perform its traditional public functions." *Wyatt*, 504 U.S. at 167. The balance struck by qualified immunity, at least implicitly contemplates a government actor acting for the good of the state, not a private actor for the good of the pocketbook.

(App. 15-16)

The Sixth Circuit's decision, admittedly relies on an "implicitly" broad reading of *Wyatt* which is unreasonable and is clearly in conflict with applicable decisions of the First, Seventh, Tenth and Eleventh Circuits which have considered the precise question presented herein. Circuit Judge Nelson, in his separate opinion concurring in the judgment, noted that he was constrained by binding Sixth Circuit precedent from holding that petitioners were entitled to qualified immunity, which has adopted a per se rule *"that private parties are not eligible for immunity from suit."* (App. 21) (Emphasis in text) *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988); *Vector Research, Inc. v. Howard & Howard, P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996):

> If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss. . . . The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those that feed at the public trough. This view is not one I share. If it is sound public policy to

> offer qualified immunity from suit to correctional officer employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees perform identical public functions. . . . In the post-*Wyatt* era, I imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purpose. . . . Given *Duncan*, however, I do not believe the qualified immunity option is currently open to our panel. . . . *This holding may be too broad*, but our circuit precedent rule makes it binding on us here.

(App. 20-22) (Emphasis added)

In *Procurrier v. Naverette*, 434 U.S. 555, 561-562 (1978) the Court held that state correctional officers are entitled to qualified immunity. The policy rationale offered by the Sixth Circuit in rejecting qualified immunity for private correctional officers is totally inconsistent with the Court's longstanding functional approach in determining the application of qualified immunity. *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (employees function within the state system, not the precise terms of employment, determines whether actions of the defendant can be fairly attributed to the state); *Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity justified by the functions it protects and serves, not by the person to whom it attaches); *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (immunity flows not from rank or title or location within the government, but from the nature of the responsibilities of the individual involved); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (immunity analysis rests on functional categories not on

the status of the defendant); *Butz v. Economou*, 438 U.S. 478, 503 (1978) (administrative hearing examiner is functional equivalent to a judge).

The functional analysis approach employed by the Court when applied to the facts of this case inescapably ordains for the extension of the qualified immunity defense to private correctional guards performing unique police powers of incarceration of convicted felons under state custody exclusively reserved to the sovereign. *Rendall-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (the relevant question is not whether a private group is serving a "public function" but whether the function performed has been "the *exclusive* prerogative of the state"). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974). The traditional and exclusive public function delegated by the State of Tennessee, privatizing correctional services under the Private Prison Contracting Act of 1986, T.C.A. § 41-24-101, et seq., by contract to CCA and in turn to its private correctional officers similarly should turn on an analysis tailored to the scope and nature of the function performed by petitioners and not whether one holds the status of government employee as opposed to private contract employee when both functions are conducted under color of law for the benefit of the public interest.

This case presents the Court with an opportunity to clarify whether private correctional officers acting under color of law in the performance of exclusive public functions delegated to them under state law and contract which require them to undertake the same discretionary acts for the public benefit as provided by state employed correctional officers should be entitled to the defense of

qualified immunity. Petitioners perform the same discretionary functions in their daily interactions with violent criminal offenders, and are called upon to make the same decisions for the benefit of the public interest as state correctional officers working at prisons operated by the state. There is no allegation in this case that petitioners conspired with government officials for private gain or self-interest to act beyond the boundaries of the law or the scope of their duties, which permits but does not require them to act in a certain manner. *Dennis v. Sparks*, 449 U.S. 24, 25 (1978) (action under § 1983 available against private co-conspirators of state trial judge that alleged to have corruptly issued an injunction even though judge has absolute immunity). The denial of qualified immunity to private correctional officers employed by CCA under state contract would implicate an unsound policy of placing form over substance. Neither is there anything in *Wyatt* that suggests that the Court intended to abandon its longstanding functional analysis approach in immunity cases, nor does it appear that the Court remotely intended to establish a per se bright line rule implicated by the Sixth Circuit's decision herein that private persons acting under color of law may never be shielded by qualified immunity. To the contrary, after the *Wyatt* decision the Court noted in *Antoine v. Byers & Anderson, Inc.*, 598 U.S. 429, 432 n.3 (1993) (rejecting claim of absolute immunity for private court reporters as the performance of their public duties are purely ministerial, involving no acts of discretion) that the Second, Fifth and

Eighth circuits hold that private court reporters that provide stenographic services to trial courts are entitled to qualified immunity.[4]

In sum, the South Central Correctional Center is a prison facility owned and managed by the Corrections Corporation of America under color of law, providing correctional services under state contract as authorized by Tennessee law as an innovative *experimental* program, whose performance standards and qualitative operations are pervasively regulated and supervised by the Tennessee Commissioner of Corrections, the Tennessee Attorney General, and both houses of the Tennessee legislature under T.C.A. § 41-24-104. *Garcia v. San Antonio Metro. Authority*, 469 U.S. 528, 543-46 (1985) (concluding that the distinction between "traditional" governmental functions and proprietary functions was both unworkable in practice and unsound in principle, since it is inconsistent with federalism's basic tenet that states should be free to *experiment* with "any activity that their citizens choose for the common weal"). (Emphasis added)

These petitioners, in their capacity as correctional officers employed by CCA and acting under color of law, perform exclusive discretionary police powers and functions delegated to them by the State of Tennessee identical to state employed correctional officers. It is the public interest, not the narrow personal interests of the petitioners that warrants the granting of qualified immunity

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[4] *See, Green v. Maraio*, 722 F.2d 1013, 1018 (2d Cir. 1982); *Slavin v. Curry*, 574 F.2d 1256, 1265-1266 (5th Cir. 1978); *McLallen v. Henderson*, 492 F.2d 1290, 1299-1300 (8th Cir. 1974).

to them. The policy concerns that litigation costs substantial sums of money and diverts public servants' energy from their public responsibilities and duties, and that the threat of liability deters those considering public service will "dampen the ardor of all but the most resolute, or the most responsible public officials, in the unflinching discharge of their duties," applies to the functions performed by CCA's correctional officers. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Litigation against these petitioners carries the same social costs as those faced by state officers and will divert their energies from their duties as their state counterparts. CCA did not contract to provide correction services for the State for benevolent reasons. Any costs of litigation will ultimately be passed on to the State. The specter or threat of litigation will also deter those who might otherwise seek employment opportunities with CCA, and by CCA itself when it considers contracting their services with a governmental agency. There is no reason to believe that the threat of personal liability suits brought under 42 U.S.C. § 1983 would have any less "dampening" effect on CCA correctional officers in the discharge of their discretionary duties than it would have on state correctional officers.

SCCC is a prison owned, managed and operated by CCA on behalf of the State, and the public has a significant interest in having those individuals that serve in these facilities do so free of the threat of unnecessary litigation. It furthers the public interest that qualified private contractors such as CCA and these petitioners not be discouraged from performing their important governmental discretionary functions by working at SCCC due to the ever present threat of personal liability. In addition,

if the Sixth Circuit decision is permitted to stand, it could affect the willingness of the several states, its political sub-divisions and the federal government to engage private contractors in the joint development of cooperative experimental programs in furtherance of the public good. This is particularly so as the society enters a period of government downsizing and expanded reliance on the private sector to perform a variety of traditional public functions. Contrary to the Sixth Circuit's decision herein, granting of qualified immunity as an available defense to the petitioners appropriately strikes a fair and proper balance between the strong societal interest of compensating individuals for unconstitutional deprivations while at the same time insuring that private persons will not be deterred from the performance of valuable and important governmental functions.

VII. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CHARLES R. RAY
ROBERT S. CATZ
211 Third Avenue North
Nashville, TN 37201
(615) 256-2111

Counsel for Petitioners

August 26, 1996

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*RECOMMENDED FOR FULL-TEXT PUBLICATION**
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0205P (6th Cir.)
File Name: 96a0205p.06

No. 95-5398

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONNIE LEE MCKNIGHT, *Plaintff-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Middle District of Tennessee
JOHN REES, *Defendant,*	)	
DARYLL RICHARDSON and JOHN WALKER, *Defendants-Appellants.*	)	

Decided and Filed July 10, 1996

Before: KEITH, MARTIN, and NELSON, Circuit Judges.

MARTIN, J., delivered the opinion of the court, in which KEITH, J., joined. NELSON, J. (pp. 17-19), delivered a separate opinion concurring in the judgment.

BOYCE F. MARTIN, JR., Circuit Judge. Tennessee contracts with private corporations to operate its prison facilities. In their capacities as correctional officers, defendants Daryll Richardson and John Walker allegedly

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* Reported at 88 F.3d 417 (6th Cir. 1966).

violated plaintiff Ronnie McKnight's Eighth Amendment right to be free from cruel and unusual punishment. Richardson and Walker now pursue this interlocutory appeal from the district court's denial of their motion to dismiss McKnight's section 1983 action.[1] Richardson and Walker argue that they are entitled to qualified immunity from suit, and that the district court erred in concluding otherwise. For the reasons set forth below, we AFFIRM.

McKnight filed this action under 42 U.S.C. § 1983 on March 3, 1994, against John Rees, the warden of the Corrections Corporation of America's South Central Correctional Center, and correctional officers Richardson and Walker.[2] Rees was subsequently dismissed from the suit, and his dismissal is not before this Court.

In his complaint, McKnight alleged that these officers violated his constitutional rights under the Eighth Amendment by subjecting him to tight restraints during

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[1] We have jurisdiction to hear this interlocutory appeal pursuant to the Supreme Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985). We pause only to note that the Court's recent decision in *Johnson v. Jones*, 115 S.Ct. 2151, 2156 (1995), does not alter our authority to hear an appeal from the denial of qualified immunity in cases in which the district court's decision rests on a legal conclusion. *Mitchell*, 472 U.S. at 530. *Johnson* held only that we do not have interlocutory jurisdiction to review a denial of qualified immunity when the district court bases its decision on the ground that a genuine issue of material fact exists. *Johnson*, 115 S.Ct. at 2156; *Blair v. Meade* 76 F.3d 97, 100 n. 2 (6th Cir. 1996). Where, as here, the district court bases its decision on a legal conclusion, our interlocutory jurisdiction remains intact.

[2] Corrections Corporation of America is a private, for-profit corporation that has contracted with the State of Tennessee to maintain some of its correctional facilities.

his transport to another prison. He claims that the restraints caused him serious medical injury which actually required hospitalization. Finally, the complaint states that McKnight's protestations were ignored, and that Richardson and Walker taunted him after he complained about the restraints.

Richardson and Walker moved to dismiss the complaint, asserting that they were entitled to qualified immunity pursuant to their job function as correctional officers. The district court denied the motion to dismiss, holding that Richardson and Walker, as employees of a private, for-profit corporation, were not entitled to the defense of qualified immunity. This timely interlocutory appeal followed.

Section 1983 provides a cause of action against any person who, under color of state law, deprives an individual of any right, privilege, or immunity secured by the Constitution and federal law.[3] 42 U.S.C. § 1983. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158,

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[3] Richardson and Walker do not dispute that they were acting under color of state law for the purposes of section 1983 liability, even though each are privately employed by Corrections Corporation of America. Under the test set forth by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), it appears that these defendants can be liable under section 1983, and are acting "under color of state law." *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1264-67 (3d Cir. 1994) (discussing the *Lugar* test in depth). Nonetheless, we simply assume without deciding this fact for the purposes of this appeal.

161 (1992) (citation omitted). The Supreme Court has repeatedly recognized that "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' " *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Balanced against this concern is the equally important need to ensure that the threat of personal liability does not inhibit public officials from vigorously performing their duties as representatives of the public interest. *Id.* We are asked here whether accommodation of these competing interests warrants the extension of qualified immunity to corrections officers employed by a private corporation under contract with the State of Tennessee.

We begin by noting that *state employed* correctional officers do enjoy the protections of qualified immunity in carrying out their duties. *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *Williams v. Bass*, 63 F.3d 483, 486 (6th Cir. 1995). It is not immediately apparent, however, whether *private* correctional officers, performing by contract functions admittedly similar to those traditionally within the governmental sphere, should or should not be granted similar immunity. The principles undergirding qualified immunity do not necessarily apply with equal force when a private actor seeks its invocation.

In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), this Court held that qualified immunity does not protect from subsequent liability private individuals who resort to state garnishment or prejudgment attachment procedures in pursuit of personal interests. *Id.* at 1264-66. In so holding, we examined the scope of the immunity doctrine

developed by the Supreme Court, initially pointing out that "section 1983 allows no immunities on its face." *Id.* at 1263; *See also Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). However, we also recognized that the Supreme Court has afforded governmental officials one form of immunity or another in a variety of situations. *Duncan*, 844 F.2d at 1263. Thoroughly examining the common law history of immunity for private individuals and the policy rationales traditionally used to justify immunity, we concluded that neither supported the grant of qualified immunity to the private actors in that case. *Id.* at 1264. The Supreme Court has embraced this position as well. *Wyatt*, 504 U.S. at 168-69 (holding that private parties invoking state garnishment or prejudgment attachment statutes later found to be unconstitutional are not entitled to qualified immunity). We have recently reaffirmed this approach in a *Bivens* action. *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996) (holding that private attorneys who assisted federal agents in a search and seizure pursuant to an ex parte order could be liable for constitutional violations arising out of their conduct). Nonetheless, neither *Vector Research, Duncan* nor the Supreme Court's decision in Wyatt necessarily forecloses the application of qualified immunity here because each of those cases relied in part on the fact that the policy rationales that support qualified immunity did not apply on the facts. Further inquiry is needed, and we must examine the public policy underpinnings of qualified immunity to determine whether these defendants should be allowed to utilitize its protections.

When determining whether a private individual may claim qualified immunity as a defense to a section 1983 claim, the Supreme Court's decision in Wyatt teaches that we must look first to determine whether the "tradition of immunity [is] . . . firmly rooted in the common law." Wyatt, 504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)). However, we also note that the Supreme Court's decision in *Harlow v. Fitzgerald*, "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645 (citing *Harlow*, 457 U.S. at 815-20. Therefore, although we have already recognized that there is "no evidence that the common law ever extended [qualified] immunity to include private citizens," *Duncan*, 844 F.2d at 1264, we conclude that, when determining whether qualified immunity is appropriate, the traditions of common law immunity inform our analysis but the presence or absence of immunity found there is not necessarily dispositive.

In addition to examining the historical roots of immunity, we also determine whether strong public policy reasons support the recognition of qualified immunity in particular cases. *Wyatt*, 504 U.S. at 164-66; *Duncan*, 844 F.2d at 1263-64 (relying on *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981)). At this juncture of the analysis, we are informed by the Supreme Court's explanation that we must "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted" to determine whether we should recognize qualified immunity in a given case. *Forrester v. White*, 484 U.S. 219, 224 (1988). Finally, when determining whether public policy supports the grant or

denial of immunity, "[w]e do not have a license to establish immunities from [section] 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). We turn now to a perusal of the various rationales utilized to support qualified immunity.

While discussing the rationale underlying the creation of immunity from suit in *Forrester v. White*, the Court explained that:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. . . . When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.

484 U.S. at 223. Emphasizing that courts should adopt a "functional" approach to questions of immunity, the *Forrester* Court characterized the inquiry as one in which courts should "seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of [the relevant government] functions." *Id.* at 224.

In *Wyatt*, the Supreme Court held that private defendants may not invoke the protections of qualified immunity when charged with section 1983 liability after utilizing state replevin, garnishment, and attachment statutes later held to be unconstitutional. 504 U.S. at 168-69. The Court explained that the rationales advanced in support of qualified immunity for government actors are "not transferable to private parties." *Id.* at 168. The Court further elaborated:

> [W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. . . .
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> [P]rivate parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending Harlow qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to

> resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Id. at 167-68 (citations omitted). The broad language used by the Court in this passage might lead one to believe that qualified immunity simply is not available to private party defendants, regardless of the nature of the act for which they are sued. However, the Court expressly limited its holding to the "precise issue" of whether qualified immunity is available to private defendants faced with section 1983 liability after utilizing a state replevin, garnishment or attachment statute. *Id.* at 168-69.

Accordingly, several circuits read Wyatt narrowly, as applying only to cases in which a private party invokes state law to pursue a private interest. *See Eagon v. Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996) (discussing cases); *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794-95 (11th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) (same). These circuits contrast two lines of cases in determining whether a private party should be granted qualified immunity under section 1983. In those cases rejecting a qualified immunity defense and falling within the scope of the Supreme Court's decision in Wyatt, private parties "invoked state law in pursuit of private ends," *Warner v. Grand County*, 57 F.3d 962, 966 (10th Cir. 1995), which is precisely the situation this Court confronted in *Duncan*. *See, e.g., Burrell*, 970 F.2d at 796 (denying qualified immunity to private defendants who allegedly conspired with public officials for the sole purpose of depriving plaintiff of constitutional rights); *see*

also Howerton v. Gabica, 708 F.2d 380, 385 n. 10 (9th Cir. 1983) (denying qualified immunity to a landlord who enlisted the services of a police officer and conducted an allegedly unconstitutional eviction of tenant). However, where private defendants are fulfilling government contracts or following court orders, several circuits have held that the umbrella of qualified immunity protects the private actors. *Warner*, 57 F.3d at 965-66 (qualified immunity extended to private crisis center director conducting strip search at the request of police officers); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993) (qualified immunity for private psychiatric center for involuntary detention of allegedly mentally ill patient at the request of arresting officer); *Frazier v. Bailey*, 957 F.2d 920, 928 (1st Cir. 1992) (qualified immunity for social workers under contract with the state to provide investigation of child abuse claims). In *Warner and Sherman*, the Tenth and Seventh Circuits each held that *Wyatt* did not foreclose qualified immunity for private individuals who, at the request of a state officer, perform the duties allegedly giving rise to the section 1983 claim. *Warner*, 57 F.3d at 967; *Sherman*, 987 F.2d at 405-06.

In *Sherman*, the plaintiff had been involuntarily detained and given anti-psychotic medication pursuant to court order at the Four County Counseling Center. *Sherman*, 987 F.2d at 398-99. After his release from the center, Sherman sued pursuant to section 1983 the officer who arrested him and applied for the psychiatric evaluation, the state judge who assigned him for evaluation, the attorney who represented him at his preliminary hearing, Cass County, and Four County Counseling Center. On appeal, the Seventh Circuit considered whether Four

County was entitled to qualified immunity for its actions. Answering the question in the affirmative, the court noted that Four County had accepted and administered care to Sherman under the state judge's emergency detention order, and had complied with procedures set forth by Indiana statutory law during Sherman's involuntary detention. *Id.* at 405. These facts, according to the court, warranted the extension of qualified immunity to Four County:

> The policy justifications which underlie the doctrine of qualified immunity for government officials apply with full force to Four County's activities here. Although it is a private hospital, Four County accepted and cared for a state mental patient committed on an emergency basis. . . . If the actions it took pursuant to court order subject it to suit, private hospitals might well refuse to accept involuntary patients. This refusal would increase the load on the strained resources of the state's public hospitals. . . . [O]ne purpose of qualified immunity is to avoid discouraging public service. Denying qualified immunity to private hospitals in this situation would do just that.

Id. at 405-06 (citations omitted).

The Seventh Circuit recently reaffirmed the *Sherman* holding in a case factually analogous to the case at bar. In *Williams v. O'Leary*, the court held that medical director and staff physician of the Stateville Correctional Center in Illinois were entitled to qualified immunity even though each was an employee of Correctional Medical Systems, a private company contracting with the state to provide medical services at state correctional facilities. 55

F.3d 320, 323-24 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995). After reviewing the two lines of cases discussed *supra*, the *Williams* court held that "[t]he instant case clearly falls within the class of cases in which qualified immunity may be raised by a private defendant." *Id.* at 324. The court believed that the fact that the defendant was "performing duties that would otherwise have to be performed by a public official who would clearly have qualified immunity" weighed in favor of granting qualified immunity to the private defendant. *Id.* (quoting *Frazier*, 957 F.2d at 928).

In *Eagon v. Elk City*, the Tenth Circuit recently reaffirmed its rule that "a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself." 72 F.3d at 1489 (quoting *Warner*, 57 F.3d at 967). One of the defendants in Eagon was a private party in charge of granting or denying applications for Christmas displays in a city park in Elk City, Oklahoma pursuant to a city council resolution. The lawsuit arose out of the denial of an application for a Christmas display. On appeal, the court addressed whether the private party defendant was entitled to assert a qualified immunity defense for her actions. Ultimately, the Tenth Circuit believed that qualified immunity protected the private defendant's actions, concluding that the defendant "was performing a government function pursuant to a government request," and therefore was entitled to qualified immunity for her actions. *Id.* at 1490.

Turning to the precise question presented in this case, we note that this is a case of first impression in this circuit, and that no other circuit has addressed whether correctional officers employed by a private corporation under contract with the state are entitled to qualified immunity. Federal district courts are in conflict on the issue. *See Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312 (W.D.La.1995) (extending qualified immunity to private correctional officers); *Smith v. United States*, 850 F. Supp. 984 (M.D.Fla.1994) (same). *But see Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D.Tenn.1994) (refusing to grant qualified immunity to correctional officers employed by private corrections corporation). Some of these courts utilized a functional approach to conclude that correctional officers employed by private corporations under contract with the state are entitled to qualified immunity. *E.g., Citrano*, 891 F. Supp. at 316-17. At least one has concluded that the public policy underpinnings of qualified immunity do not support extending its protections to private correctional officers. *Manis*, 859 F. Supp. at 305.

Broadly stated, the Supreme Court has "followed a 'functional' approach to immunity law." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Harlow*, 457 U.S. at 810; *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (stating that "our cases clearly indicate that immunity analysis rests on functional categories" rather than "on the status of the defendant"). Relying on this fact, some circuits emphasize the function performed by the private party in determining whether to extend qualified immunity to the private defendant. For example, the First Circuit has held that "private parties under contract to perform statutorily

mandated governmental duties are entitled to qualified immunity as functionally government employees." *Frazier*, 957 F.2d at 928; *see also Williams*, 55 F.3d at 323 (stating that qualified immunity extends to "a private party acting under a government contract fulfilling a governmental function; parties fulfilling statutorily mandated duties under a contract; and a physician acting pursuant to a court order") (quoting *Sherman*, 987 F.2d at 405). While we do not disagree that we must examine the function or nature of the conduct at issue as an initial matter, we do not believe the analysis begins and ends with asking the question whether the private party is performing a government function. We must also examine whether the "special policy concerns involved in suing government officials," *Wyatt*, 504 U.S. at 167, also support the grant of qualified immunity to private actors performing what are traditionally governmental functions, as is the case here. *See Vector Research, Inc.*, 76 F.3d at 698-99. Therefore, we next discuss whether the public policy underpinnings of qualified immunity support extending its protections to the private defendants here, guided in our analysis by the informed opinions of our sister circuits discussed above, and the Supreme Court's pronouncements on the issue.

Very generally, "qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167 (citing *Harlow*, 457 U.S. at 819). At its core, the protection "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 168. Immunity seeks "to ensure that talented candidates [are]

not deterred by the threat of damage suits from entering public service." *Id.* at 167; *Harlow*, 457 U.S. at 816 (stating that immunity serves to prevent the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

The public undoubtedly has an interest in maintaining secure and efficient correctional facilities. We need not recite the litany of public benefits traditionally associated with maintaining an effective penal system here. We pause only to note that contracting out that function may save money for the state's coffers, in addition to the traditional safety, deterrence, retribution, and symbolic rationales trotted out at every round table argument over criminal punishment. Suffice it to say that it is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities.

Nonetheless, we also recognize that, while privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security.[4] While this

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[4] We do not seek by implication to question the actions or intent of these defendants. Rather, we are simply pointing out

arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167 (citation omitted). The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook. With respect to cutting corners on constitutional guarantees, one commentator has explained that "[e]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent." Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 Yale L.J. 353, 357 (1986).

We believe this increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation to run a state's prison facilities. Because private corporations operating correctional facilities are not "principally concerned with enhancing the public good," *Wyatt*, 504 U.S. at 168, the appropriate balance between the vindication of constitutional guarantees and the furtherance of the public interest cannot be struck by a liability rule which assumes as its starting point a public employee acting primarily for the benefit

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that for-profit corporations – and indirectly the employees of those corporations – seek to realize what the name implies, a profit. Accordingly, private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise.

of the public. To maintain this balance, the liability rule must adjust, and we believe the rule falls somewhere short of qualified immunity for these privately employed officers.

To be sure, our refusal to grant qualified immunity to private corrections officers will result in increased litigation costs, which may ultimately be passed on to the state in form of an increased contract price. However, the public interest in minimizing the costs of maintaining efficient, workable prison systems is not necessarily at odds with this result. This increased litigation cost may be offset, at least partially, by the reduced administrative costs associated with monitoring the private correctional facilities to ensure compliance with constitutional rights. To the extent that private enforcement through section 1983 acts as an effective monitor of private correctional corporations, states will realize reduced administrative monitoring costs because the threat of liability (and therefore reduced profits) will force the private actor to internalize the monitoring costs otherwise borne by the state. In short, the state may pay more to obtain private correctional services, but less to monitor them on an ongoing basis.

Further, the denial of qualified immunity here will not deter talented candidates from entering public service, another of the major concerns undergirding qualified immunity doctrine. *See e.g., Wood v. Strickland*, 420 U.S. 308, 320 (1975) (stating that the "most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"). We make two comments on this

issue. First, the simple fact is that correctional officers, privately employed by a corporation contracting with the state, are not in "public" service, although they are performing a service that undoubtedly benefits the public interest. The motivations for entering the field undeniably differ from those prompting, for example, a run for public office, which rarely is undertaken for financial reasons. Rather, the spur in the flank of private correctional corporations is, of course, the profitability of the enterprise. The denial of qualified immunity will not deter qualified firms from contracting with the state to manage correctional facilities. Instead, firms simply will take account of this fact when analyzing the corporate balance sheet, and contract with the state accordingly. As long as a profit can be realized from the venture, we have no fear that denying qualified immunity to these defendants will result in a dearth of qualified applicants seeking entry into the field.

In sum, we disagree somewhat with the approach taken by several other circuits, which simply asks whether the private actor is performing a traditional governmental function (often, as is the case here, because the state has decided to "privatize" that function by contracting it out), and if so, extends immunity's protective cloak to cover the private actors. As we only recently explained, "the rationale for granting qualified immunity to public officials – that they [will] act decisively in their jobs for the public good without fear of being sued – [does] not apply with equal force to private parties acting for their own ends." *Vector Research*, 76 F.3d at 699 (citation omitted). Under our analysis, we would perhaps reach a similar result via a slightly different route if

confronted with facts similar to some of the cases from our sister circuits discussed above. However, in the case before us, we believe the public policy underpinnings of qualified immunity – which strike a balance between compensation for constitutional injury and the public interest in effective government – do not apply with equal force to acts undertaken by employees of a private, for-profit corporation. We therefore refuse to grant qualified immunity to correctional officers employed by a private corporation to maintain prison facilities for the state.

It may be that the appropriate balance to be struck here is to permit the correctional officers to assert a good faith defense, rather than qualified immunity. *See Vector Research*, 76 F.3d at 699 (allowing attorneys to assert a good faith defense to Bivens claim); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3d Cir. 1994) (allowing good faith defense to section 1983 claim); *Duncan*, 844 F.2d at 1267-68 (same). However, that issue is not before this Court in this interlocutory appeal. We leave that issue for another day, hold only that correctional officers employed by private, for profit corporations in contract with the state are not entitled to qualified immunity.

The judgment of the district court is AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in the judgment.

If I believed that we were free to dispose of this appeal on public policy grounds, my vote would be to remand the case with instructions to dismiss it should the district court conclude that the conduct of the defendant

correctional officers could reasonably have been thought consistent with the constitutional rights the officers are alleged to have violated. The notion that there is likely to be a meaningful difference between the behavior of a correctional officer whose paycheck comes from the State of Tennessee and the behavior of a correctional officer whose paycheck comes from the Corrections Corporation of America is a notion, it seems to me, that bespeaks a vaguely utopian view of the virtues of those who feed at the public trough. This view is not one I share. If it is sound public policy to offer qualified immunity from suit to the correctional officer employed by a public corporation, I think it is equally sound policy to offer qualified immunity to the officer employed by a private corporation, assuming both employees perform identical functions for identical reasons.

As a matter of circuit precedent, however, I believe that this panel is foreclosed from following the course to which my own view of public policy might point. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), as the Supreme Court has recognized, "[t]he Sixth Circuit . . . rejected qualified immunity for private defendants sued under § 1983 but . . . established a good faith defense." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

In rejecting qualified immunity for private parties, the *Duncan* panel applied a two-part test:

> "The first part requires the party claiming immunity to show that the immunity was recognized at common law. The second part requires a showing of strong public policy reasons for granting such an immunity." *Duncan*, 844 F.2d at 1264 (footnote omitted).

The holding of *Duncan* was stated by the panel as follows:

> "Because we find no evidence that private parties were immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties, *we hold that private parties are not eligible for immunity from suit.*" *Id.* (Emphasis supplied.)

This holding may be too broad, but I believe that our circuit precedent rule makes it binding on us here. It is true that where public officials are concerned, the Supreme Court has disclaimed any "suggest[ion] that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). As *Anderson* went on to say, "[t]hat notion is plainly contradicted by *Harlow [v. Fitzgerald*, 457 U.S. 800 (1982)], where the Court completely reformulated qualified immunity along principles not at all embodied in the common law. . . . " *Id.* But the Supreme Court decided *Anderson* well before this court decided *Duncan*, so Anderson does not relieve us of the obligation to follow *Duncan*. And the two decisions are not inconsistent in any event, *Duncan* having involved private parties and Anderson having involved an agent of the Federal Bureau of Investigation.

Neither, of course, does the Supreme Court's subsequent decision in *Wyatt* relieve us of the obligation to follow *Duncan*. The *Wyatt* Court pointed out that the Sixth Circuit's blanket rejection of qualified immunity for private defendants conflicts with other circuits' recognition of such immunity under certain circumstances, but *Wyatt* did not resolve the conflict. In the post-*Wyatt* era, I

imagine, most of our sister circuits will probably continue to make qualified immunity available to private defendants who perform governmental functions for governmental purposes. Several circuits have already done so – see, *e.g.*, *Williams v. O'Leary*, 55 F.3d 320 (7th Cir.), *cert. denied*, 116 S.Ct. 527 (1995) (private physicians whose employer held contract with state prison system to provide medical services for inmates could assert qualified immunity); *Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995) (director of a private "crisis center" who performed body cavity search at sheriff's request entitled to qualified immunity); *Leeks v. Cunningham*, 997 F.2d 1330 (11th Cir.), *cert. denied*, 114 S. Ct. 609 (1993) (private physician providing medical services under contract with county jail entitled to qualified immunity). Given *Duncan*, however, I do not believe that the qualified immunity option is currently open to our panel.

Except insofar as to the right to an interlocutory appeal is concerned, the courts' increasingly benign attitude toward summary judgment proceedings may frequently mean that there will be little practical difference between the good faith defense that was recognized in *Duncan* and the qualified immunity "defense" (arguably a misnomer, see *Duncan*, 844 F.2d at 1265) recognized by our sister circuits. The good faith defense is not before us now, however, and I intimate no view as to whether the defendants can prevail on such a defense under the facts of this case.

For the reasons stated, I concur in the affirmance of the district court's denial of qualified immunity.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

RONNIE MCKNIGHT	]	No. 1-94-0042
	]	Judge Higgins
v.	]	(Filed
JOHN REES, et al.	]	March 1, 1995)

ORDER

The Court has before it the defendants' objections (filed February 6, 1995; Docket Entry No. 30) to the Report and Recommendation (entered February 2, 1995; Docket Entry No. 26).

The Court has independently reviewed the Magistrate Judges findings and conclusions, the objections and the entire record.

The Court finds that the objections are without merit and are overruled.

The Report and Recommendation is adopted and approved.

Accordingly, the motion (filed December 2, 1994; Docket Entry No. 12) of the defendants, Daryll Richardson and John Walker, to dismiss on the basis of qualified immunity[1] is denied.

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[1] This Court has held previously that a private corporation and its employees operating a prison under contract with the state are not protected by qualified immunity. *See Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994).

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
2-28-95

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

RONNIE MCKNIGHT	]	
	]	NO. 1:94-0042
v.	]	
	]	
JOHN REES, et al.	]	

TO: Honorable Thomas A. Higgins, District Judge

REPORT AND RECOMMENDATION

By an Order entered March 4, 1994, the Court referred the above captioned civil rights action to the Magistrate Judge for consideration of its malicious or frivolous nature, 28 U.S.C. § 1915(d); *Malone v. Colyer*, 710 F.2d. 258, 261 (6th Cir. 1983), and further proceedings, if necessary, under Rule 72(b) of the Federal Rules of Civil Procedure and Local Rules of Court.

Now pending before the Court is the motion to dismiss of the defendants Daryll Richardson and John Walker. (Docket Entry No. 12). For the reasons set out below, the Court recommends that the motion be denied.

I. BACKGROUND

Plaintiff Ronnie McKnight, currently an inmate of the Tennessee Department of Corrections ("TDOC") confined at the South Central Correctional Center ("SCCC"), filed this action *pro se* and *in forma pauperis* on March 3, 1994, under 42 U.S.C. § 1983. He seeks monetary relief for alleged violations of his constitutional rights which occurred at the SCCC. The plaintiff alleges that his Eighth

Amendment right to be free from cruel and unusual punishment was violated when he was subjected to excessively tight restraints during his transport to another prison. He asserts that the restraints caused him extreme pain and swelling which later required hospitalization. He asserts that his complaints about the restraints were ignored and even met with taunts from the defendants.

Pursuant to an Order entered July 6, 1994 (Docket Entry No. 7), process was issued to SCCC correctional officers Daryll Richardson and John Walker on the plaintiff's claim. The defendants were served with process and answered the complaint with a denial of constitutional wrongdoing. Discovery and other pretrial activity has occurred pursuant to a scheduling order. The matter is set for a jury trial on March 13, 1995.

II. CONCLUSIONS

The defense of qualified immunity is provided to government officials so that they can perform their duties without being exposed to lawsuits and liability for discretionary decisions made during the performance of their duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Poe v. Haydon*, 853 F.2d 418, 423 (6th Cir. 1988).

By their motion, the defendants assert that they are entitled to qualified immunity from any damages claim in this action. They assert that although they are not employed by the state but by a private corporation which

has contracted with the State[1], the public policy rationale underlying the qualified immunity defense applies as equally to their situation as it does to a defendant whose paycheck comes from the State of Tennessee.

The defense of qualified immunity for employees of the CCA has previously been rejected by this Court. *See Manis v. Corrections Corporation of America*, 859 F. Supp. 302 (M.D.Tenn.1994) (Memorandum and Order entered August 2, 1994) (attached). Although the defendants make a valiant effort to "row their boat upstream", see memorandum in support at p. 2., they fail to set forth a persuasive reason why the Court's decision in *Manis* should not control the qualified immunity analysis in this action. The safety net of qualified immunity will not prevent the defendants from being swept downstream to a trial of this action.

RECOMMENDATION

Based on the foregoing, the Court respectfully RECOMMENDS that the defendants' motion to dismiss be DENIED.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this report, or the proposed findings or recommendation to which objection is

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[1] The defendants are employees of the Corrections Corporation of America, Inc. ("CCA") which has contracted with the State of Tennessee to operate the SCCC.

made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d. 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Juliet E. Griffin
Juliet E. Griffin
UNITED STATES
MAGISTRATE JUDGE

ATTACHMENT To Report & Recommendation*
McKnight v. Rees 1:94-0042

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

CARENCE MANIS	]	
V.	]	No. 1-92-0111
	]	Judge Higgins
CORRECTIONS	]	
CORPORATION	]	
OF AMERICA, et al.	]	

MEMORANDUM

The question has arisen whether a private corporation and its employees operating a prison under a contract with the State of Tennessee are protected from suit by the qualified immunity of public officials. For the reasons set forth below, the Court concludes that they are not.[1]

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* Reported at 850 F. Supp. 302 M.D.Tenn.1994.

[1] The defendants raised this issue by moving to dismiss the action on the basis of qualified immunity. *See* Defendants' motion (filed February 22, 1994; Docket Entry No. 35) to dismiss. The Magistrate Judge recommended that the qualified immunity defense was applicable to the defendants. *See* Report and Recommendation (entered April 5, 1994; Docket Entry No. 48). The Court, however, rejected this aspect of the Report and Recommendation, stating that it would set forth its reasons in a forthcoming memorandum. *See* Order (entered June 6, 1994; Docket Entry No. 60).

I.

The facts of this case are set forth in detail in the Report and Recommendation (Docket Entry No. 48) of the Magistrate Judge. In brief, they are as follows.

The plaintiff is a state inmate in the custody of the Tennessee Department of Correction. He is incarcerated at a prison operated by Corrections Corporation of America (CCA). CCA is a private corporation that operates some of Tennessee's prisons pursuant to a contract with the State.

The plaintiff has sued CCA and one of its employees under 42 U.S.C. § 1983.[2] He alleges that the defendants were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. The defendants moved to dismiss the action on the grounds that they are protected by the qualified immunity of public officials.

The Magistrate Judge concluded that certain questions of fact precluded dismissal of the action, but he recommended that qualified immunity should be applied to the defendants. In his opinion, "[c]reating an arbitrary distinction between prison officials who are government officials and prison officials who are private parties, despite the fact that they both perform the same functions, places form over substance and runs counter to the

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[2] By an amended complaint (filed March 8, 1994; Docket Entry 43) the plaintiff has added a private physician as a third defendant. The physician has not joined in the instant motion to dismiss. Thus, for present purposes, the Court uses the phrase "the defendants" to refer to CCA and its employee but not the physician.

rationales behind qualified immunity." Report and Recommendation at 8. The Court disagrees.

II.

Title 42 U.S.C. § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128, 136 (1976). However, the Supreme Court has "accorded certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." ' " *Wyatt v. Cole* 504 U.S. ___, 112 S.Ct. 1827, 1831, 118 L.Ed.2d, 504, 512 (1992) (quoting *Owen v. City of Independence*, 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)).

Thus, immunity from suit under Section 1983 today depends on whether such an immunity was recognized at common law when the statute was enacted and whether public policy would support such an immunity.[3] The United States Court of Appeals for the Sixth Circuit has reduced this analysis to a concise two-part test: "The first part requires the party claiming immunity to show that the immunity was recognized at common law. The second part requires a showing of strong public policy reasons for granting such an immunity." *Duncan v. Peck*, 844 F.2d

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[3] Section 1983 originally was enacted by the 42nd Congress as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13.

1261, 1264 (6th Cir. 1988). Indeed, in a somewhat different context, the Court of Appeals already has applied this analysis to the question presented here and concluded "[b]ecause we find no evidence that private parties were immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties, we hold that private parties are not eligible for immunity from suit." *Id.* (holding that private individual who seized property pursuant to unconstitutional state attachment statute was not protected by qualified immunity); *see also Wyatt v. Cole, supra,* (holding the same).

A. The Common Law.

There is no mistaking that the Supreme Court has taken an historical approach to determining the availability of immunity from suit under Section 1983. As noted above, the statute on its face does not provide for any immunities at all. However, the Court has recognized their existence, not by "judicial fiat," but "upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman,* 424 U.S. at 421, 96 S.Ct. at 990, 47 L.Ed.2d at 138. Assuming that the 42nd Congress was familiar with the immunities of public officials at common law, the Court has inferred from Congress' silence that it intended to preserve those immunities where they would not defeat the statute's purpose. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 258-59, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616, 626-27 (1981); *Wyatt v. Cole,* 504 U.S. at ___, 112 S.Ct. at 1831, 118 L.Ed.2d at 512. The Court has never recognized any immunity under Section 1983

except where there was an historical antecedent at the time the statute was enacted. *See Malley v. Briggs,* 475 U.S. 335, 342, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 279 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice, and that we are guided by the common-law tradition.").

The Sixth Circuit has examined the common law origins of the immunity of public officials and determined that it never extended to private citizens:

> The common law doctrine of immunity from suit originated from the concept that because "the King can do no wrong," it would be a contradiction of his sovereignty to allow him to be sued as of right in his own courts. W. Prosser and W. Keeton, *The Law of Torts,* § 131 (5th ed. 1984). Gradually, this concept was broadened to cover other government officials. *Scheuer v. Rhodes,* 416 U.S. 232, 239, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Yet, we find no evidence that the common law ever extended the immunity to include private citizens.

Duncan v. Peck, 844 F.2d at 1264. This finding by the Court of Appeals – that the common law never extended immunity to private citizens – is fatal to the defendants' assertion of immunity in this case. As noted above, the only basis for immunity under Section 1983 is the assumption that the 42nd Congress was cognizant of the common law immunities of its day and intended to preserve them in Section 1983. There is, thus, no basis for concluding that private parties, such as these defendants, who would not have been entitled to immunity at common law, should be afforded immunity under Section 1983 today.

B. Public Policy.

Notwithstanding the lack of any historical basis for extending immunity to private citizens, the Magistrate Judge proceeded directly to the question of whether public policy favored the defendants being protected by qualified immunity in this case. Because the Court disagrees with the Magistrate Judge's conclusion on this point, it shall elaborate on the implicit danger of affording qualified immunity to private parties.

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 514. Such a balance is necessary because of the conflict created by holding government officials personally liable for actions taken "under color of law." On the one hand, personal liability has the salutary effect of making public officials obey the law or compensate their victims when they do not. On the other hand, it has the perverse effect of inhibiting public officials in the proper performance of their duties, or even deterring talented candidates from entering public service altogether, out of fear of incurring monetary liability or harassing lawsuits. *Forrester v. White*, 484 U.S. 219, 223,108 S.Ct. 538, 542, 98 L.Ed.2d 555, 562-63 (1988); *Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 514-15. Thus, the Supreme Court has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged

to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523, 530 (1987). This qualified immunity protects earnest public officials who risk running afoul of the law in a genuine effort to serve the public. "In short, the qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt*, 504 U.S. at ___ 112 S.Ct. at 1833, 118 L.Ed.2d at 515.

A private party that performs a government function for a fee, however, is not faced with the conflict of public officials, for it is not principally interested in the good of the public at large. "[A] private party is governed only by self-interest and is not invested with the responsibility of executing the duties of a public official in the public interest." *Duncan*, S44 F.2d. at 1264; *see also Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833, 118 L.Ed.2d at 515 (private parties are not "principally concerned with enhancing the public good"). In the case of a private for profit corporation hired to perform a public function, there is an increased risk that the corporation's actions will diverge from the public interest. Unlike public officials, corporate officers and employees are hired to serve the interests of the corporation, and, more specifically, its stockholders, whose principal interest is earning a financial return on their investment. Indeed, corporate officers owe a fiduciary duty to advance stockholders' interests, but they owe no such fiduciary duty to the public at large. Thus, unlike public officials, corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public.

Especially when a private corporation is hired to operate a prison, there is an obvious temptation to skimp on civil rights whenever it would help to maximize shareholders' profits. Affording the shield of qualified immunity to a private corporation and its employees in these circumstances would directly contradict the policy behind qualified immunity: instead of promoting the public good by freeing public officials "to make decisions that are . . . above all . . . informed by considerations other than the personal interests of the decisionmaker," *Forrester*, 484 U.S. at 223, 108 S.Ct. at 542, 98 L.Ed.2d at 562, it would simply free a private corporation to maximize its profits, even at the cost of citizens' rights. In such circumstances, the threat of incurring money damages might provide the *only* incentive for a private corporation and its employees to respect the Constitution. Therefore, the best policy is not to afford them any immunity from suit.

CCA is a purely private corporation, and its employees are private individuals who have contracted to do the corporation's business. There is no compelling reason why these private parties should not have to come to court, like any other private party, to defend themselves when another citizen claims that they violated his legal rights. *See Wyatt*, 504 U.S. at ___, 112 S.Ct. at 1833-34, 118 L.Ed.2d at 515 ("[U]nlike with government officials . . . , the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.").

III.

Because there is no precedent at common law for extending qualified immunity to private parties and because public policy disfavors such an extension, the Court concludes that the defendants in this case are not protected by qualified immunity.[4]

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
8-1-94

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[4] The Court is aware of only one other decision addressing the question of whether a corporation and its employees operating a prison under contract with a state are protected by the qualified immunity of public officials. In *Tinnen v. Corrections Corporation of America*, 91-2188-TUA (W.D. Tenn. Feb 22, 1994) (unpublished opinion), on facts almost – identical to those here, Judge Turner concluded that they were. His analysis was similar to that of the Magistrate Judge, reasoning that the similar "function" of public officials and private parties operating a prison justified extending qualified immunity to the latter. *Id.* at 6.

Of course, this Court is not bound by decisions from the Western District of Tennessee. For the reasons stated, the Court respectfully disagrees with Judge Turner's opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT
NASHVILLE, TENNESSEE

RONNIE McKNIGHT, Plaintiff, -VS- JOHN REES, Warden, CCA/SCCC South Central Correctional Center, C/O RICHARDSON, Correctional Officer (Transpertation [sic]), and C/O JOHN DOE, Correctional Officer (Transpertation [sic]) (real name is presently unknown) Defendants.	)	CASE NO. #1-94-0042 (Filed Mar. 3, 1994) JUDGE HIGGINS

CIVIL RIGHTS COMPLAINT UNDER
42 U.S.C. SECTION 1983

This is a CIVIL RIGHTS COMPLAINT seeking damages against the defendants for committing acts under COLOR OF STATE LAW, and depriving plaintiff of RIGHTS secured by the TENNESSEE STATE CONSTITUTION, and the UNITED STATES CONSTITUTIONS [sic]. Defendants, while acting in their individual and official capacites [sic] acted in concert, and in systematically and deliberately in violating plaintiff's Constitutionally Secured Rights, including, but not limited to, those enumerated in the succeeding paragraphs.

1. Rhis [sic] Court has JURISDICTION of this action under TITLE 42 U.S.C., SECTION 1983, for CIVIL RIGHTS VIOLATION COMPLAINT.

2. The JURISDICTION of this Court is further invoked pursuant to TITLE 28 U.S.C., SECTION 2201; and §1331.

I. PLAINTIFF:

1. Plaintiff, RONNIE McKNIGHT, is a citizen fo [sic] the UNITED STATES OF AMERICA, and a resident of the STATE OF TENNESSEE, and of the JURISDICTION and JUDICIAL DISTRICT of this HONORABLE COURT. (MIDDLE DISTRICT OF TENNESSEE)

2. Plaintiff is and was at all times mentioned in this complaint a "Prisoner" of the Tennessee State Department Of Correction via the Corrections Corporation Of America/South Central Correctional Center at P.O. Box 279 - Clifton, Tennessee 38425-0279, and in the costody [sic] of the defendant John Rees, Warden.

II. DEFENDANTS:

1. The Defendants, are all citizens of the UNITED STATES OF AMERICA, and residents of the STATE OF TENNESSEE, and all residents of the JURISDICTION and JUDICIAL DISTRICT of this HONORABLE COURT. (MIDDLE DISTRICT OF TENNESSEE)

2. The defendant JOHN REES, is the warden by title of the Corrections Corporarion [sic] Of America/South Central Correctional Center, and as such, pursuant to T.C.A. §41-1-104 (a) "The warden has the charge, custody and safekeeping and welfare of the prisoners" . . . He has the

charge and custody of the penitentiary, with the land, buildings, tools, implements, and every-other species (including his employees and subordinates) of property within the precincts thereof, . . . "

a). Paragraph (b) – "The custody, welfare, conduct, and safekeeping of the convicts *shall* be the responsibility of the warden. He *will* examine into the affairs of the Institution *daily* to assure that proper standards are maintained".

b). The warden is further and pursuant to the "Inate [sic] Orientation Handbook, Rules and Regulations therein. (Page 3, paragraph 1)" "Responsible for the conduct and actions of his employees and subordinates, including the defendants named in this inatant [sic] action. Further, "The Rights of the Convicts: "As an inmate of the Tennessee Department Of Correction – Corrections Corporation Of America/South Central Correctional Center, you have the right as a human-being to be treated RESPECTFULLY, IMPARTIALLY, and FAIRLY by all STAFF. Including the times when an inmate is being transported to and from another facility.

c). The warden is further and pursuant to T.C.A. §41-1-103 – Oath Of Officers and impolyees [sic] – (in part) "I do solemnly swear (or affirm) that I will fully, faithfully, impartially, and dillegently [sic] perform all of the duties (responsibilities) required of me as (warden) (correctional officers/transpotation [sic] officers) in the penitentiary; . . . and that I will on no occasion ILL-TREAT OR ABUSE any convict under my care, beyound [sic] the punishment ordered by law or the rules and regulations of the institution".

d). The defendant, Warden Rees is the chief administrative officer of Corrections Corporation Of Ameriac [sic]/ South Central Correctional Center, and as such, he is responsible for the administration of the facility, and of the custody, welfare, and safekeeping of the prisoners incarcerated therein. He is responsible for creating, promulating [sic], and maintaining interdepartmental rules and regulations that will protect the plaintiff (ocnvicts [sic]) form [sic] harsh, ill and abusive treatment, and of the actions of his officers, employees, staff, and subordinates (including the defendants named herein in this complaint and action).

2. The Defendant, C/O RICHARDSON, is a correctional officer by title of the Corrections Corporation Of Aremica [sic]/South Central Correctional Center, who at all times mentioned in this Complaint held the position of "Transportation Officer", and he was assigned to transportation on the 13th. day of September, 1993. He was charged with the responsibility and duty of transporting inmates (Plaintiff) to and from CCA/SCCC to Turner Center, located in Only, Tennessee.

a). Defendant C/O Richardson, was and continues to be in charge with the responsibility pursuant to T.C.C. §41-1-103 – Oath Of Officers and Employees: (in part) " . . . to fully, faithfully, impartially, and diligently perform all of the duties required of me as ___, (Correctional Officer – Transportation Officer) in the penitentiary (CCA/SCCC). I do solumly swear (or affirm) that I will execute the laws and regulations, and rules prescribed for the government of said institution, so far as concerns his (my) office . . . that I (he) will on no occasion, *ill-treat* or *abuse* any convict (plaintiff) under my (his) care, beyond

the punishment ordered by law, or the rules and regulations of the institution".

b). (c) "the violation of this oath by any of the officers or employees (including C/O Richerdson [sic]) shall be perjury, punishable as in other cases of perjury".

3. The Defendant, C/O JOHN DOE, is a correctional officer by title of the Corrections Corporation Of America/South Central Correctional Center, who at all times mentioned in this complaint held the position of "Transportation Officer", and assigned to the AM shift, he was assigned to transportation on the 13th. day of September, 1993. Defendant C/O John Doe, and defendant C/O Richardson were both assigned together as transportation officers on the 13th. day of September, 1993. Defendant C/O John Doe, is a caucasian approximately *5'10"* feet tall, *Dark* hair, and about *26/27* years old. He was on the 13th. day of September, 1993, charged with the responsibility and duty of transporting inmates (plaintiff) to and from CCA/SCCC to Turner Center, located in Only, Tennessee.

a). Defendant C/O John Doe, was and continues to be charged with the responsibility pursuant to T.C.A. §41-1-103 – Oath Of Officers and Employees: (in part) " . . . to fully, faithfully, impartially, and diligently perform all of the duties required of me as ___, (Correctional Officer – Transportation Officer) in the penitentiary (CCA/SCCC). I do solumly [sic] swear (or affirm) that I will execute the laws and regulations, and rules prescribed for the government of said institution, so far as concerns jis [sic] (my) office . . . that I (he) will on no occasion, *ill-treat* or *abuse* any convict (plaintiff) under my

(his) care, beyond the punishment ordered by law, or the rules and regulations of the institution".

b). (c) "the violation of this oath by any of the officers or employees (including C/O John Doe) shall be perjury, punishable as in other cases of perjury".

4. Both defendant C/O Richardson, and defendant C/O John Doe, are correctional officers and employees of the Corrections Corporation Of America/South Central Correctional Center, they are action [sic] under Color Of State Law, and pursuant to the Institutional Inmate Hand-Book, the Rules and Regulations therein. To Wit: (Page 3 – paragraph 1 – Inmates Rights. – "You have the right as an inmate to expect that as a human being you will be treated respectfully, impartially, and fairly by all departmental personnel. (including the defendants). See also: T.C.A. §41-1-103; and §41-1-104 (b) supra, and §41-1-116.

III. PREVIOUS LAWSUITS:

Plaintiff respectfully asserts that there have been no other lawsuits filed in the State or Federal Courts dealing with the same favts [sic] and circumstances involved in this action and complaint and/or otherwise relating to plaintiff's imprisonment.

IV. GRIEVANCE PROCEDURES:

a). Plaintiff respectfully asserts that he filed an Inmate's Grievance complaining of the ill treatment, abusive treatment, and abusive language that the defendants C/O Richardson, and C/O John Doe, subjected him to on September 13, 1993, further, plaintiff complainted [sic] of

the injuries that he suffered as a direct results [sic] of the defendant's actions and conduct. The Grievance Board Committee dismissed plaintiff's grievance and complaint, stating that this was not a grievance matter. Subsequently, plaintiff have been subjected to retaliation and reprisal from the defendants co-workers and correctional officers.

V. FACTS:

Plaintiff respectfully asserts that on the 13th. day of September, 1993, plaintiff was being transported from Middle Tennessee Reception Center – 7177 Cockrill Bend Industrial Road – Nashville, Tennessee, to Corrections Corporation Of Americe/South-Central Correctional Center – P.O. Box 279 – Clifton, Tennessee.

Upon plaintiff being secured and prepared for the bus transfer from Middle Tennessee Reception Center, the M.T.R.C. Transportation Officers ascertained and recognized plaintiff's physical size and health conditions, upon ascertaining that plaintiff's wrists and ankles was [sic] larger than normal and that plaintiff himself was a karge [sic] man. To Wot [sic]: Plaintiff is 49 years old, overweight and poor health; 302 lbs.; 5' 11" in hight [sic]; Ankle size larger than normal; Wrist size larger than normal; Waist 50".

Plaintiff asserts that the M.T.R.C. Transportation Officers determined that plaintiff's wrist was too large for the handcuffs to fit around, and that his ankles was [sic] to [sic] large for the leg shackles to fit around without great difficulty, and force, coupled with severe pain and suffering to the plaintiff, therefore the M.T.R.C. Transportation Officers determined that they would only put the Leg-Shcckles [sic] on plaintiff's wrists, and a waist chain

around his waist to secure plaintiff for the tranfer. Plaintiff had to be assisted in getting on the bus, because of his size, health conditions, and the cuffs and chain.

Plaintiff respectfully asserts that after arriving at Turner Center Prison in Only, Tennessee approxixately half way to CCA/SCCC – Clifton, Tennessee, that plaintiff and the other inmates had to change buses and transportation officers to complete the trip, that at this point the M.T.R.C. Transportation Officers removed the leg-shackles from around plaintiff's wrist, and the chain from around his waist and turned plaintiff over to the CCA/SCCC Transportation Officers (defendants C/O Richardson, and C/O John Doe. Thereupon the CCA/SCCC Transportation Officers took custody and charge of plaintiff.

Plaintiff respectfully asserts that upon preparing and securing plaintiff for transfer, that the defendants C/O Richardson, and C/O John Doe (Transporattion Officer from CCA/SCCC) forced the hand-cuffs around plaintiff's wrist, and forced the ankle cuffs/shackles around his ankles, and put the chain around his waist.

Plaintiff then complained that the cuffs was to tight, and was cutting off his blood circulation, and that he was in severe pain. Plaintiff was unable to get on the bus by himself, he had very little movement, therefore both defendants together pushed plaintiff up on the bus, plaintiff continued to plead with the defendants to please loosen the hand and leg cuffs, plaintiff also told the defendants that his arms and legs had started swelling and was causing more pain. Some of the other inmates on the bus also intervened and ask the defendants to loosen

the hand and leg cuffs, because my legs and arms was turning colors and swelling up.

The defendants, both of them, acting both individually and in a concert of action wherein each said defendant acquiesced, condoned, encouraged, and assisted the actions of the other in a deliberate effort to single out plaintiff for harsh, arbitrary, discriminatory and ill and abusive treatment with regards to cuffing and shackling plaintiff beyond what was necessary in knowing disregard of the fact that plaintiff's constitutional rights prohibiting cruel and unusual punishment under the Eighth Amendment were thereby violated.

The above described actions by Defendants, and each of them, deprived Plaintiff of his Civil Rights, including his rights to be treated as a human, and to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution, and by Title 42 of the United States Code, Section 1983, and Tennessee Statutory and Constitutional Law.

Plaintiff respectfully asserts that during the course of the trip from Turner Center prison, Only, Tennessee, to Corrections Corporation Of America/South Central Correctional Center, Clifton, Tennessee, the defendants made several demeaning, degrading, hurtful, slanderous, and condescending remarks and statements to plaintiff, in regards to plaintiff's criminal offense and conviction, and stating that plaintiff was getting what he deserved; That a low-down scum like me should suffer; When plaintiff inquired about how long the trip would take, he was told to set [sic] down and shut up and that it was none of his damn business; When plaintiff requested again that the

cuffs and leg shackles be loosen [sic] and adjusted, he was told to suffer.

Plaintiff respectfully asserts that when the bus arrived at CCA/SCCC, that he was unable to get off the bus by himself, and that walking was impossible without the assistance of other inmates, plaintiff had to see the medical personnel immediately because of the severe pain to his legs and arms, coupled with the swelling of his legs and arms, plaintiff was hospitalized because of his conditions resulting from the cuffs and leg shackles being put on him to [sic] tight, and cutting off the blood circulation in his arms and legs for more than a hour and half (1½ hours). Plaintiff continues to be under the doctor's care and treatment, and receives medications for his legs and arms, and blood circulation.

Plaintiff respectfully asserts that the ill and abusive treatment, coupled with the discriminatory, savage, and inhumane treatment, and further, the disdainful, condescending, and prejudice attitudes, acts and conduct of the defendants C/O Richardson, and C/O John Doe (transportation officers) and against the plaintiff, has caused, and contniues [sic] to cause plaintiff mental anguish, anxiety and depression, in addition to the various symptoms of physical ailments to plaintiff's arms, and legs, and other physical ailments that he suffers as a direct result of the defendants, each of them, forcing "to [sic] small", "tight fitting", "cttting [sic] and cramping", "improperly adjusted" hand cuffs and leg shackles on plaintiff, and dispite [sic] plaintiff's complaints and cries for mercy and some relief. The defendants, each of them, with full knowledge, deliberately, intentionally, and wilfully failed and refused to correct and to alleviate such

inhumane conditions, in violation of the Eighth Amendment Rights of plaintiff to be free from cruel and unusual punishment.

VI. LEGAL CLAIMS:

Plaintiff respectfully asserts that defendant C/O Richardson, and defendant C/O John Doe, was and continues to be in violation of his Tennessee State, and United States Constitutional Rights by their acts, actions, and conduct as herein described and complained of, supra. Specificially plaintiff's Eighth Amendment Rights. [The right to be free from crual [sic] and unusual punishment] [The prohibition against inflammatory, and discriminatory slurs, remarks, language, and treatment], and plaintiff's rights to be treated as a human and pursuant to T.C.A. §39-16-402. – Official Conduct and Misconduct Of The Convict, §39-16-403. – Official Oppression, T.C.A. §41-1-103. – Oath Of Officers and Employees; §41-1-116. – Qualifications Of Correctional Officers; and Title 42 U.S.C. Section 1983, for Civil Rights Violation Complaints.

Plaintiff respectfully asserts that as a proximate result of the unconstitutional treatment, the inhumane and abusive treatment, the discriminatory and prejudice attitudes acts, and conduct of the defendants, coupled with the demeaning, degrading, slanderous, and condescending slurs and remarks, the mental abuse that the defendants subjected the plaintiff to, and in addition to the physical ailments as described and complained of which he is entitled to recover damages jointly and severally from each of the defendants

VII. PRAYER FOR RELIEF:

WHEREFORE:

Plaintiff respectfully request and prays of this Honorable Court:

1. That this plaintiff be awarded a judgment against each of the defendants jointly and severally, for compensatory damages in the amount of TWO-HUNDRED THOUSAND ($200,000.00) DOLLARS, and including incidental damages. And punitive damages for the violation of plaintiff's Civil Rights in the amount of TWO-HUNDRED THOUSAND ($200,000.00) DOLLARS.

2. That plaintiff be able to recover the costs of this cause, action and complaint.

3. That plaintiff be awarded reasonable expenses and attorney fees pursuant to the provisions of Title 42 U.S.C., SECTION 1983, and SECTION 1988.

4. That a jury be impaneled to try this cause.

5. That plaintiff be awarded such other, further, and necessary relief as this Court seems just, proper and equitable.

Respectfully Submitted,

/s/ Ronnie L. McKnight
RONNIE L. McKNIGHT, pro se.
#222102 – Unit – Apollo AA
CCA/SCCC – P.O. Box 279
Clifton, Tennessee 38425-0279

Subscribed to and sworn before me
this 24th day of February, 1994.

/s/ _____
Notary Public

My Commission Expires: 07/21/97.

THE PRIVATE PRISON CONTRACTING ACT OF 1986
T.C.A. § 41-24-101 et seq.

41-24-101. Short title. – This chapter is designated as the "Private Prison Contracting Act of 1986."

41-24-102. Definitions. – As used in this chapter, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of correction;

(2) "Correctional services" means the following functions, services and activities, when provided within a prison or otherwise:

(A) Education, training and jobs programs;

(B) Recreational, religious and other activities;

(C) Development and implementation assistance for classification, management information systems, or other information systems or services;

(D) Food services, commissary, medical services, transportation, sanitation or other ancillary services;

(E) Counseling, special treatment programs, or other programs for special needs; and

(F) Operation of facilities, including management, custody of inmates, and providing security;

(3) "Department" means the department of correction;

(4)

"Prison" or "facility" means any adult institution operated by or under the authority of the department; and

(5) "Prison contactor" or "contractor" means any entity entering a contractual agreement with the commissioner to provide correctional services to inmates under the custody of the department.

41-24-103. Contracts for correctional services. – (a) The commissioner is authorized to enter into contracts for correctional services only as provided in this chapter.

(b) Contracts for correctional services as defined in § 41-24-102(2) may be entered into subject to the requirements and procedures of §§ 12-4-109 and 12-4-110, and any additional requirements specified in this chapter.

(c) A contract for correctional services as defined in § 41-24-102(2)(F) is authorized only for one (1) medium security or minimum security facility opened after July 1, 1991, and only according to the requirements and procedures specified in this chapter. No such contract shall be authorized for a facility intended primarily to serve special needs inmates.

(d) Any inmate sentenced to confinement in the department shall be legally eligible to be incarcerated in a facility in which a prison contractor is providing correctional services pursuant to this chapter.

41-24-104. Review and approval of contract proposals – Price and cost adjustments – Cancellations. – (a) Any contract for correctional services as defined in § 41-24-102(2)(F) shall be entered into only after each of the following requirements and/or conditions are met:

(1) Any request for proposals, any original contract, any contract renewal and any price and/or cost adjustment or any other amendment to any contract shall first be approved by the following:

(A) The state building commission;

(B) The attorney general and reporter; and

(C) The commissioner of correction;

(2) Each of the following committees shall review any request for proposals, any original contract, and any proposed contract renewal:

(A) Select oversight committee on corrections;

(B) Fiscal review committee;

(C) Senate state and local governmental committee; and

(D) House state and local government committee;

(3) To be considered for an award of a contract, the proposer must demonstrate to the satisfaction of each of the officials set forth in subdivision (a)(1) that it has:

(A) The qualifications, operations and management experience and experienced personnel necessary to carry out the terms of the contract;

(B) The ability to comply with applicable correctional standards and specific court orders, if required; and

(C) Demonstrated history of successful operation and management of other correctional facilities; and

(4) Proposer must agree that the state may cancel the contract at any time after the first year of operation,

without penalty to the state, upon giving ninety (90) days written notice.

(b)(1) Any such contract may provide for annual contract price and/or cost adjustments; provided, that any such adjustments may be made only once each year effective upon the anniversary of the effective date of the contract. If any adjustment is made pursuant to terms of the contract, it shall be applied to total payments made to the contractor for the previous contract year and shall not exceed the percent of change in the average consumer price index (all items-city average) which is published by the United States department of labor, bureau of labor statistics, between that figure for the latest calendar year and the next previous calendar year.

(2) Any price and/or cost adjustments to any such contract different than those authorized by subsection (b)(1) may be made only if the general assembly specifically authorizes such adjustments and appropriates funds for such purpose, if required.

(c)(1) No award of any such contact shall be made unless an acceptable proposal is received pursuant to any request for proposal. An "acceptable" proposal means a proposal which meets all the requirements and/or conditions set forth in this chapter and meets all the requirements in the request for proposal.

(2) No proposal shall be accepted unless:

(A) Such proposal offers a level and quality of services which are at least equal to those which would be provided by the state; and

(B) The cost of the private operation, plus the state's cost for monitoring the private operation, are

no greater than the state's cost for operating a medium or minimum security prison of like design.

(3) The select oversight committee on corrections, or any other committee designated by the speakers of the senate and house, shall review the proposals and shall advise the persons listed in subdivision (a)(1) of the level and quality of services proposed.

(4) Should the state be required to assume the operation of any facility contracted under the provisions of this chapter, preference in state employment shall be given to persons who are employees of the contractor at the time of the state's assumption of operation of such facility.

(5) Any preference in employment must be in compliance with the provisions of title 8, chapter 30, and § 41-1-116, and performance of duties as an employee of the contractor must have been satisfactory.

41-24-105. Term of contract – Review of performance – Renewal. – (a) For any contact to provide correctional services as defined in § 41-24-102(2)(F), the initial contract term shall be for a period of three (3) years in order to allow the contractor sufficient time to demonstrate its performance and to provide sufficient information to allow a comparison of the performance of the contractor to the performance of the state in operating similar facilities.

(b) The initial contract may include an option to renew for an additional period of two (2) years.

(c) After the first two (2) years of operation, but before renewing the initial contract, the performance of he contractor shall be compared to the performance of the

state in operating similar facilities, as provided in this section.

(d) The contract may be renewed only if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to those provided by the state at essentially the same cost.

(e) The quality of services provided by the contractor and by the state at similar facilities shall be compared by the select oversight committee on corrections, or any other committee designated by the speakers of the senate and house. The committee shall determine whether the services provided by the contractor are superior, essentially equal, or poorer than services provided by the state. In making its determination, the committee shall consider, among other factors; the nature of inmates in the facilities; whether the facilities meet professional standards; the level of training provided staff and the level of training accomplished by staff; the number and nature of complaints against staff; the number and nature of violent or other disruptive incidents among inmates or against staff; the number of escapes and attempted escapes; the number and nature of disciplinary actions against inmates and staff; the number of inmates productively active, the level of production, and the nature of the activity provided inmates; the rate at which inmates complete programs successfully; or other matters related to the quality of services provided. The committee shall report its determination to the parties responsible for determining whether the contract should be renewed.

(f) The fiscal review committee, or any other committee designated by the speakers of the senate and house, shall compare the full costs of the contractor with the state's full costs of operating similar facilities. The committee shall determine whether the contractor is providing services at greater, essentially equal, or lower cost. In making its determination, the committee shall consider all relevant costs of operation, including direct and indirect costs which should be allocated or assigned to the operations. The costs attributable to the contractor shall include any costs of monitoring the contract incurred by the department of correction or any other state agency which would not have been incurred by the state otherwise. The committee shall report its determination to the parties responsible for determining whether the contract should be renewed.

41-24-106. Standards of security – Resumption of state control on termination of contract. – Notwithstanding any other provision of this chapter to the contrary, prior to entering a contract for providing the security function for any prison, such as providing correctional officers or other persons providing security and control over inmates, the following requirements shall be met:

(1) A plan shall be developed and certified by the governor which demonstrates the method by which the state would resume control of the prison upon contract termination. Such plan shall be submitted for review and comment to the select oversight committee on corrections and the oversight committee shall solicit comments from law enforcement agencies, district attorneys general, criminal judges in the county in which the prison is located and the surrounding counties. State officials

responsible for approving any contract for the security function or any contract which includes provision of security are encouraged to await the comments of the oversight committee prior to executing any such contract; and

(2) The commissioner shall certify to the select oversight committee on corrections that the security procedures proposed by the contractor are equal or superior to the security procedures in effect at existing state-operated prisons and the commissioner shall comment on the relationship of the procedures proposed by the contractor to each standard of security and control specified in the standards for adult correctional institutions by the American Correctional Association.

41-24-107. Financial information from contractor – Insurance requirements – Sovereign immunity. – (a) Notwithstanding any other provision of this chapter to the contrary, no contract for correctional services as defined in § 41-24-102(2)(F), shall be entered into unless the following requirements are met:

(1) The contractor provides audited financial statements for the previous five (5) years or for each of the years the contractor has been in operation, if fewer than five (5) years, and provides other financial information as requested; and

(2) The contractor provides an adequate plan of insurance, specifically including insurance for civil rights claims, as determined by an independent risk management/actuarial firm with demonstrated experience in public liability for state governments. Such firm shall be selected by the commissioner of commerce and insurance

with the concurrence of the board of claims. In determining the adequacy of the plan, such firm shall determine whether:

(A) The insurance is adequate to protect the state from any and all actions by a third party against the contractor or the state as a result of the contract;

(B) The insurance is adequate to protect the state against any and all claims arising as a result of any occurrence during the term of the contract; that is, the insurance is adequate on an occurrence basis, not on a claims-made basis;

(C) The insurance is adequate to assure the contractor's ability to fulfill its contract with the state in all respects, and to assure that the contractor is not limited in this ability because of financial liability which results from judgments; and

(D) The insurance is adequate to satisfy such other requirements specified by the independent risk management/actuarial firm.

(b) The sovereign immunity of the state shall not apply to the contractor. Neither the contractor nor the insuror of the contractor may plead the defense of sovereign immunity in any action arising out of the performance of the contract.

41-24-108. Application of certain criminal laws to contractor-operated facilities. – The provisions of title 39, chapter 5 [repealed], including without limitation § 39-5-201 [repealed] and part 7 [repealed], and the provisions of title 39, chapter 16, including without limitation § 39-16-201 and §§ 39-16-605 – 39-16-608, shall apply to offenses committed by or with regard to inmates assigned

to facilities or programs for which a prison contractor is providing correctional services.

41-24-109. Monitoring of contractor performance – Reports. – In addition to other powers and duties prescribed by law, the commissioner shall monitor any contracts with prison contractors providing correctional services and shall report at least annually or as requested to the select oversight committee on corrections or any other legislative committee on the performance of the contractor.

41-24-110. Powers and duties not delegable to contractor. – No contract for correctional services shall authorize, allow or imply a delegation of the authority or responsibility of the commissioner to a prison contractor for any of the following:

(1) Developing and implementing procedures for calculating inmate release and parole eligibility dates;

(2) Developing and implementing procedures for calculating and awarding sentence credits;

(3) Approving inmates for furlough and work release;

(4) approving the type of work inmates may perform, and the wages or sentence credits which may be given to inmates engaging in such work; and

(5) Granting, denying or revoking sentence credits; placing an inmate under less restrictive custody or more restrictive custody; or taking any disciplinary actions.

41-24-111. Application of certain administrative laws to contractor. – All existing provisions of law shall

apply to a prison contractor except as provided in this section or otherwise provided in this chapter:

(1) Title 12, chapter 3, relative to public purchases, shall not apply to purchases and procurements of a prison contractor providing correctional services;

(2) Title 8, chapter 30, relative to civil service, shall not apply to employees of a prison contractor;

(3) A prison contractor providing correctional services shall not be bound by provisions of law governing the appointment, qualifications and duties of wardens, superintendents and other correctional employees, including provisions of title 4, chapter 6, and chapter 1 of this title, except as required to comply with the Constitution of Tennessee; and

(4) Title 8, chapters 34 and 35, relative to membership in the Tennessee consolidated retirement system, shall not apply to employees of a prison contractor except as provided specifically in this chapter.

41-24-112. Consolidated retirement system. – (a) The following provisions shall govern eligibility for membership in the Tennessee consolidated retirement system for employees of a prison contractor providing correctional services as defined in § 41-24-102(2)(F):

(1) Department of correction employees in positions under the control and supervision of the department which become subject to a contract with a prison contractor and who are members of the retirement system immediately preceding the contract implementation date shall remain eligible to continue membership under the same conditions that apply to state employees. Such employees

shall make the same contributions and be eligible for the same benefits as state employees; and

(2) Any other person, including any person employed or re-employed after the date a prison contractor assumes the management and operation of a department facility, shall not be eligible for membership in the Tennessee consolidated retirement system.

(b) An employee who participates in the retirement system may not participate in any retirement plan offered by the prison contractor. Any employee eligible under subsection (a) may continue membership or may elect to withdraw membership from the retirement system as follows:

(1) Such election to withdraw shall take place within thirty (30) days after the employee completes one (1) year of employment under the prison contractor;

(2) Upon the election to withdraw, the employee may receive a refund of accumulated contributions;

(3) The election to withdraw constitutes a waiver of any right, present or future, to re-establish such service at a later date based on employment at a correctional facility under a prison contractor; and

(4) If an election to withdraw is not made within the thirty-day period, the employee shall be deemed to have elected continued membership in the retirement system. Withdrawal at a later date will be permitted only upon the termination of service with the prison contractor.

(c) In no event will a department employee be allowed to retire and receive benefits while continuing employment with a prison contractor.

(d) The prison contractor shall make normal contributions, special accrued liability contributions, and cost of living contributions, as determined by an actuarial valuation, in the same way as for state employee members, for one (1) year for each employee described in subsection (b) and for each employee who thereafter elects to continue membership in the retirement system.

(e) The prison contractor shall pay contributions to the board of trustees of the retirement system according to a schedule set by the board.

(f) The department shall serve as administrative agent between the prison contractor and the Tennessee consolidated retirement system.

41-24-113. Rights of employees of contractor. – (a) The following provisions shall govern the rights of employees of the state who become employees of the contractor.

(b) Any employee of the contractor who was formerly an employee of the state shall have the following rights while in the employ of the contractor:

(1) Such employees shall be allowed to be a member of any qualified employee organization pursuant to § 8-23-204 and such employee shall be allowed, if he so elects, to pay dues in such qualified employee organization through payroll deduction; provided, that no employee of a contractor shall be deemed a state employee for the purpose of determining whether a given employee organization qualifies for payroll deduction of membership dues pursuant to § 8-23-204 nor shall such employee's membership in any employee organization

qualified under § 8-23-204 be considered to be a violation of § 8-23-204;

(2) The contractor shall give a hiring preference for available positions to laid-off employees of the department of correction; and

(3) Employees laid off by the contractor shall be given the same re-employment rights with the state as current state employees.

(c) Any employee of the contractor who was formerly a state employee, who ceases employment with the contractor, and returns to the employ of the state, shall have the following rights:

(1) Such employee shall retain all sick leave and annual leave which has been accumulated, but not greater than the amounts of leave which would have been accumulated had the employee been continuously in the employ of the state;

(2) Such employee shall be credited with any time of service with the contractor toward calculation of longevity pay benefits; and

(3) Such employee shall be admitted to the state group insurance program without proof of insurability.

41-24-114

Repealed

41-24-115. Rules and regulations. – The commissioner is authorized and directed to promulgate rules and regulations pursuant to the Uniform Administrative

Procedures Act, compiled in title 4, chapter 5, as required to effectuate the purposes of this chapter.